83 - 1619 (1)



No.

IN THE
# Supreme Court of the United States
October Term 1983

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
*Petitioners,*

*v.*

GARY ASSON, *et al.*,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO

## PETITION FOR CERTIORARI

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April 2, 1984

80 pp

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## Question Presented

Have respondent municipalities by their actions—which included inducing investment in the bonds of a public agency by expressly guaranteeing the bonds, presiding over the irretrievable expenditure of the bond proceeds on a project undertaken for public benefit, and then subsequently abrogating their guarantees as unauthorized, and refusing even to return the bondholders' funds—effected a taking of, or otherwise unconstitutionally impaired, the bondholders' property rights?

## Parties to the Proceedings

Gary Asson, Le Rae Asson, Ransom H. Brown, Betty Brown, J. R. Simplot Company, Richard H. Bohle, Paula L. Bohle, Blaine Jensen, Lillian D. Jensen, Clarence F. Bellem, Lillian B. Bellem, Magic Valley Foods, Inc., and Cameron Sales, Inc., were petitioners below.

City of Burley, Idaho; Charles Shadduck, Mayor of the City of Burley; James Parker, J. Garth Payne, Frances McDonald, Dale Doman, Walter Petersen, and Truman Bradley, as members of the City Council of Burley; City of Heyburn, Idaho; Harold R. Hurst, Mayor of the City of Heyburn; Wilford Wilcox, Dean Baker, David Mayes, and Larry McComb, as members of the City Council of Heyburn; City of Rupert, Idaho; William F. Whittom, Mayor of the City of Rupert; Clark Cameron, Dwinelle E. Allred, June Dombeck and Ronald E. Klebe, as members of the City Council of Rupert; City of Idaho Falls, Idaho; and City of Bonners Ferry, Idaho, were respondents below.

Chemical Bank and the Washington Public Power Supply System were intervenors below.

A list of the subsidiaries (other than wholly owned) and affiliates of Chemical Bank called for by Rule 28.1 is attached as Appendix F. The Washington Public Power Supply System has no affiliates.

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# TABLE OF AUTHORITIES

No.

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CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

*Petitioners,*

*v.*

GARY ASSON, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioners, Chemical Bank and the Washington Public Power Supply System (the "petitioners"), respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Idaho entered on September 26, 1983, and reaffirmed on petition for rehearing by order entered on November 4, 1983.

## Opinion Below

The proceedings below consisted solely of an original proceeding on writ of prohibition in the Supreme Court of the State of Idaho. The opinion and judgment of which review is sought were entered by that court on September 26, 1983, and are annexed as Appendix A; they are reported at 670 P.2d 839. Petitioner Chemical Bank filed a timely petition for rehearing, in which petitioner Washington Public Power Supply System ("Supply System") joined, on October 17, 1983; that petition is annexed as Appendix B. The Idaho Supreme Court denied the petition on November 4, 1983, by an order annexed as Appendix C. By orders dated January 23, 1984, and January 24, 1984, annexed as Appendices D and E, respectively, Justice Rehnquist extended until April 2, 1984, the time for petitioners to file this petition.

## Jurisdiction

The jurisdiction of the Court to review the judgment below is conferred by 28 U.S.C. § 1257(3). This case comes within that provision because it raises the issue whether respondents' conduct constituted a taking or otherwise violated the constitutional rights of bondholders for whom petitioner Chemical Bank is trustee. In view of the surprising result reached by the Idaho Supreme Court coupled with the sweeping breadth of the relief granted by that court, those issues were raised by petition for rehearing. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 85-87 n.9 (1980); *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1930).

## Statutes and Constitutional Provisions Involved

This case involves the following constitutional provisions and statutes, the texts of which are set forth in Appendix G:

—U.S. Const., Amend. XIV § 1.
—U.S. Const., Amend. V.
—U.S. Const., Art. I, § 10, cl. 1.
—Idaho Const., Art. 8, § 3.

## Statement of the Case

### Introduction

This case arises out of the largest municipal bond default in history—the recent default of petitioner Supply System on $2,250,000,000 of bonds governed by a resolution naming petitioner Chemical Bank as trustee. Those bonds were issued at the behest and for the benefit of 88 municipalities, public utility districts and rural electric cooperatives (the "participants"), including the five Idaho municipal respondents here.

As trustee, petitioner Chemical Bank represents the interests of the bondholders in this action and also in the closely related and principal litigation regarding the default which is pending in the Washington Supreme Court. Petitioner Supply System represents its own interests in these actions, including its interest in fulfilling its obligation to repay the bondholders' funds.

As explained below and in the accompanying motion to defer consideration of this petition: This case is ancillary to the principal litigation now pending in the Supreme Court of Washington. It involves only 5 of the 88 participants, all of whom are defendants in the Washington case, and it affects only a small fraction of the face amount of the bonds involved (less than 2 percent, or approximately 43 million dollars). Because of the obvious desirability of considering this case in the light of the outcome of the main litigation and avoiding piecemeal review, petitioners obtained the maximum 60-day extension for filing this petition in the hope that the decision of the Supreme Court of Washington could be considered with this petition. Although the Washington case was expedited and argued on March 26, 1984, it is pending without decision. Accordingly, to protect the bondholders and their interests, petitioners are filing this petition and are simultaneously moving to defer consideration of it and any response thereto until the Washington decision is available and this Court can consider whether to entertain any petition for a writ of certiorari filed therein.

**Background**

The circumstances preceding and precipitating the default may be briefly summarized as follows:

In the mid-1970's, public utility planners in the Northwest forecast a need by 1983 for electric generating capacity substantially in excess of existing and planned capacity. The participants, all of whom supply electricity to various customers, sought to avert this power shortfall by joining in a common venture, in which each engaged the Supply System to use its best efforts to construct and operate nuclear facilities (the "projects") on its behalf. In entering into this common endeavor, the participants pursued three basic goals:

> *First*, the participants wished to avoid expenditure of any of their own funds during construction of the projects. This goal necessitated resort to 100% outside financing.
>
> *Second*, the participants wished to translate all of the projects' anticipated benefits into savings for their ratepayers. Because the participants' goal was to reserve all of the venture's upside potential for themselves, obtaining power at the cost of production and leaving no potential for others to profit, the participants procured outside financing through issuance of debt, not equity, securities.
>
> *Third*, rather than engage in 88 separate issues of debt at each stage of financing, the participants wished to consolidate financing responsibility in the Supply System. Because the Supply System lacked any assets to secure the borrowings, this third goal required that the participants guarantee the Supply System's ability to repay funds that it would borrow on the participants' behalf.

These goals were fully realized through the Participants' Agreements ("Agreements") that the participants executed to take part in the common venture. Those Agreements required the Supply System to use its best efforts to obtain 100% outside financing through issuance of bonds. To provide the security required to market the bonds, the Agreements required the participants to make payments to the Supply System sufficient

to permit it to service its debt, whether or not the projects ultimately produced electricity, and to do so through the rates charged by the participants for electricity furnished to their customers. Those guarantees by each participant remained in force under the Agreements even if the Supply System or any participant failed to perform its contractual obligations.

The participants fully recognized the crucial role of the guarantees in permitting their common endeavor to go forward. To induce the financing required to permit the projects to proceed without expenditure of the participants' own funds, the participants unambiguously and repeatedly over a period of four years assured the purchasers of the bonds that the participants possessed—and would exercise—the authority to secure the Supply System's ability to repay the borrowed funds. On the strength of those frequently reiterated assurances, private parties advanced $2,250,000,000 for bonds issued to finance the participants' venture. Those bonds were issued in 14 series beginning in March 1977 and ending in March 1981.

The participants oversaw each of the 14 bond issues, as well as the expenditure of the proceeds of those issues, through a "Participants' Committee" ("Committee") composed of officials of the participants whom the participants elected and controlled. The Committee retained supervisory power over every significant action relating to the projects, as well as the right to propose and implement the participants' own plans. In addition to the control they exercised through the Committee, many of the participants were members of the Supply System, controlling 88% of the voting power vested in the Supply System's Board. In that capacity, those participants acted as fiduciaries for all other participants, including the five municipal respondents here.

By 1981, substantial cost overruns had created the need for additional financing. After unsuccessfully attempting to obtain such financing, the Supply System determined, through its Board of Directors, that "financing conditions beyond its control" had rendered it unable to complete construction of the projects. On January 22, 1982, the Board terminated the

projects pursuant to the termination provisions in the Agreements.

Prior to the point at which the Supply System encountered serious financing difficulties, no participant had publicly raised any question as to its authority to guarantee the debt incurred on its behalf. Nor had any of the participants' ratepayers sought to contest the propriety of the guarantees that had enabled the participants to join in the projects for the ratepayers' benefit without advancing public funds.

When it became clear that the projects would not succeed, however, almost all of the participants abruptly reversed their positions. They contradicted their prior representations and assurances, asserting that they never possessed authority to execute the unconditional guarantees on which they had invited bond purchasers and the Supply System to rely. Because the Supply System's ability to repay its obligations was totally and directly dependent on the participants' performance under their guarantees, the participants' repudiation of those guarantees required the Supply System to default on its bonds. Although they are not, and do not claim to be, financially insolvent, the participants have repudiated even an obligation to make restitution or otherwise to return the original loan advanced on the basis of their assurances. The participants thus imposed the entire cost of their venture on the bondholders.

**The Main Washington Proceeding**

In the main proceeding consolidating most of the claims relating to the participants' obligations, the Washington Supreme Court is now considering the legality of the conduct of all participants and the issues raised by petitioners under the federal and state constitutions.[1] The five Idaho participants who

[1] Three separate state court actions have addressed certain of the issues relating to the participants' obligations. *DeFazio v. Washington Public Power Supply System,* discussed *infra* at p. 11 & n.4, was instituted by ratepayers in Oregon in December 1981. The main proceeding was instituted by petitioner Chemical Bank in Washington in May 1982. The present case was instituted by ratepayers in Idaho in August 1982.

are the municipal respondents here are also defendants in that case, where they have joined with most of the other participants in vigorously claiming a right to avoid all obligations to the bondholders. Because the two cases are so closely related, and the decision in the main case will bear importantly on the effect of the decision below and the need to review it, petitioners are simultaneously moving this Court to defer its consideration of this petition until the main Washington proceeding has been decided and this Court can decide whether to entertain any petition for certiorari filed therein.

**The Present Case**

This ancillary case was brought as an original action in the Supreme Court of Idaho for a writ of prohibition. That action was filed by local ratepayers who sought to bar performance by the five participating Idaho municipalities under the Participants' Agreements on the ground that those municipalities lacked authority to guarantee the debt incurred on their behalf. Those five municipalities and certain of their officials were named as respondents. None of the bondholders or their representatives were joined as parties. Chemical Bank and the Supply System were forced to intervene to protect the bondholders and their interests.

Four of the five respondent Idaho municipalities, instead of defending their authority in court, disclaimed their prior assurances regarding the scope of their authority and adopted the ratepayers' contentions.[2] The Supreme Court of Idaho divided four to one in holding that the participating Idaho municipalities lacked authority to execute the guarantees that provided bondholders with the only security for their loan. On the basis of that holding, the Court granted the writ of

[2] Although the respondent City of Heyburn did not adopt the ratepayers' contentions, it remains the beneficiary of the resulting judgment adverse to the petitioners based on those contentions. Moreover, in the Washington proceeding, the City of Heyburn seeks to avoid any obligation to the bondholders on grounds other than lack of authority.

prohibition and entered a judgment barring the five Idaho municipal participants from imposing any rate or charge on any consumer of electricity to fund any obligation arising out of the challenged guarantees.

The holding of the Supreme Court of Idaho was surprising in view of the history of public power in the Northwest, the ownership and operation by each of the municipalities of an electrical distribution system, their unchallenged participation in three previous nuclear power projects, and the repeated assurances given of their authority to participate in the instant projects, which were believed necessary to avert an anticipated power shortage and serve their customers. Since this unanticipated holding raised substantial questions about the taking of private property contrary to provisions of the federal and state constitutions, petitioners presented those and other questions in the Petition for Rehearing (Appendix B) which was denied by order (Appendix C) without further opinion.

**Reasons for Granting the Writ**

The nation's largest municipal bond default is naturally a matter of considerable public interest. The decision below and the main litigation now awaiting decision by the Supreme Court of Washington raise substantial questions regarding whether the bondholders' property has been taken without due process in violation of federal constitutional guarantees. The actions of the five Idaho municipalities and most of the other 83 participants in inducing the sale of $2.25 billion of bonds, in spending that vast sum for public purposes, and then in repudiating their undertakings and disclaiming any responsibility for restitution or other relief when the projects soured, warrant review by this Court. Review is further needed because the decision below, holding that the Idaho municipalities lacked authority to make the necessary agreements, is a surprising change in local law that leads to evasion of the principles followed by this Court in applying the federal constitutional guarantees against the taking of private property without due process.

1. Respondents' course of conduct violates the most basic constitutional constraints on governmental power:

> *First*, after deliberately creating and repeatedly reinforcing the bondholders' expectations in order to induce private financing of a public venture, respondents have now destroyed those expectations for their own benefit. Yet the Constitution does not permit government to create "investment-backed expectations" and then subject those expectations to abrupt and total defeat. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 179 (1979).
>
> *Second*, respondents have imposed the entire cost of a public venture on a relatively small group of private parties. Such unfair conduct is precisely what the Takings Clause precludes:
>
> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[3]

The ultra vires doctrine invoked below was never intended to override, and, indeed, is clearly subject to, these basic

---

[3] The Takings Clause of the Fifth Amendment is rendered applicable to the states through incorporation in the Due Process Clause of the Fourteenth Amendment. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160 (1980). Recent cases have suggested that the Takings Clause, the Contract Clause and the Due Process Clause are governed by the same underlying principles. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 14-15 (1977); Note, *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57, 98 (1978) (comparing Contract Clause and Takings Clause); Note, *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 84 (1977) ("constitutional jurisprudence has tended to subsume the [contract] clause under the due process and takings provisions of the fifth and fourteenth amendments").

constitutional constraints. That doctrine may properly limit a municipality's contractual liability on the unavoidable occasions where officials, by evading supervision, manage to initiate transactions that exceed municipal power. But the ultra vires doctrine cannot insulate electorates and the governmental bodies they control from responsibility for deliberate policy decisions—vigorously and consistently followed—that operate to confiscate investors' funds for public purposes. No state law can properly confer such sweeping immunity, for it would thereby render unavailable any remedy for victims of unconstitutional action.

Precisely that result is threatened here. This is not a case in which duly constituted authorities have asserted the ultra vires doctrine immediately upon discovering the improper transactions of an unsupervised official. To the contrary, those who now repudiate all obligations to the bondholders are the very same collegial bodies that initially assumed those obligations. Their decision to enter the common venture was a matter of public knowledge. They repeatedly reaffirmed that decision without objection from the ratepayers whom they sought to benefit. For as long as their venture continued with some prospect of success, respondents likewise repeatedly gave assurances that they possessed the authority to secure the bondholders' funds.

Only when their venture failed did respondents change their view. Only then—after the bondholders' funds had already been expended for public benefit—did respondents discover a need to "protect the public" by renouncing an established course of conduct that they had themselves initiated and in which their constituents, seeking their own benefit, had long acquiesced.

Respondents have contended that state law allows them to disclaim all responsibility for their prior assurances and conduct. But state law cannot relieve governmental bodies of responsibilities which the Federal Constitution requires them to bear. Moreover, investors do not advance their life savings, as

have many of the bondholders here, on the understanding that they will be repaid only if the borrower considers it expedient. If state law had provided respondents with the extraordinary prerogative they now assert, they could not have sold a single bond.

Having sold the bonds, having spent the $2.25 billion proceeds for public purposes, and having repudiated their contracts and refused even to return the bondholders' original loan, respondents have effected a taking of private property for which the Federal Constitution requires compensation.

2. The need for this Court's review is heightened by the surprising and unexpected nature of the decision below—a decision which can be fairly characterized as a startling *ad hoc* change of law that had the effect of releasing respondent municipalities from obligations that had prompted widespread resentment among their constituents. It is hardly exaggerated to view the litigation as a preemptive strike by which local interests were allowed to repudiate a bargain, made for their benefit, because it turned out badly. As the dissenting justice noted (Appendix A at A-21):

> "It is only because, through hindsight, the majority can see what a 'bad deal' the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case."

The decision below, letting the Idaho municipalities off the hook, stands in sharp contrast to the recent unanimous decision of the Supreme Court of Oregon (authored by Justice Linde) that refused to apply hindsight to relieve the Oregon participants from their undertakings.[4] Considering similar state constitutional and statutory provisions, the Oregon court unani-

[4] *DeFazio v. Washington Public Power Supply System,* Nos. TC 16-81-11344; CA A26721; SC 29649, slip op. (Ore. S. Ct. March 20, 1984). For the Court's convenience, a copy of the Oregon Supreme Court's decision has been separately bound and filed with this petition.

mously concluded that the Oregon participants had the authority that the majority of the Idaho court decided was lacking.

The surprising and unanticipated nature of the decision below is apparent from the majority and dissenting opinions (Appendix A). The five Idaho participants owned and operated electrical distribution systems. They had participated in financing previous nuclear power projects. They joined with the other participants in undertaking the instant projects because of studies that additional power facilities were needed for their customers. They repeated assurances of their authority without challenge until the projects went sour. Depite all that history, the majority below concluded that the undertakings were not ordinary and necessary expenses authorized by the general laws of Idaho. As the dissent indicated, this departed from the prior construction of the "ordinary and necessary" provision of Article 8, Section 3 of the Idaho Constitution (Appendix A, at A-23 to A-24; Appendix G at G-1 to G-3).

The effect of the holding below is to leave the bondholders without any remedy. The Idaho Supreme Court rejected without discussion the federal constitutional constraints on its decision and likewise ignored the basic equitable principles that plainly were offended by respondents' conduct. For example, although respondents had expressly and repeatedly represented that the Participants' Agreements were proper in all respects, the court dismissed without discussion petitioners' claim that estoppel barred respondents from repudiating their assurances. Similarly, although it had not even been suggested that the bondholders acted in bad faith, or that they were otherwise in any way at fault, the court dismissed without discussion petitioners' claim that, if respondents were to be released from their contractual obligations, then they must at least make restitution of the bondholders' original investment.

This Court has recognized that alterations of state property law may present a dangerously effective means of increasing public wealth at the expense of private parties who lack power to protect themselves. Responding to this threat, this Court has held that state courts, "by *ipse dixit,* may not transform private

property into public property without compensation." *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 164 (1980). Similarly:

> ". . . a state [court] cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

*See also Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36, 42 (1944); *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100 (1938); *Broad River Power Co. v. South Carolina,* 281 U.S. 537, 540 (1930). This case presents a similar problem. The decision below would let local authorities and citizens retroactively disclaim responsibility for monies borrowed and spent for public purposes and leave the bondholders throughout the nation without remedy. Such protection of parochial interests without regard to the federal constitutional restraints on state action warrants review by this Court.

**Conclusion**

For the foregoing reasons a Writ of Certiorari should be granted to review the opinion and judgment of the Supreme Court of Idaho in this case.

April 2, 1984.

Respectfully submitted,

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# APPENDIX A

## APPENDIX A

**1983 Opinion No. 131**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**NOS. 14719 and 14309**

GARY ASSON and LERAE ASSON, husband and wife, citizens of the City of Burley; RANSOM H. BROWN and BETTY BROWN, husband and wife, citizens of the City of Heyburn; and J.R. SIMPLOT COMPANY,

*Petitioners,*

v.

CITY OF BURLEY; CHARLES SHADDUCK, Mayor of the City of Burley; JAMES PARKER, J. GARTH PAYNE, FRANCES MCDONALD, DALE DOMAN, WALTER PETERSEN, and TRUMAN BRADLEY, as members of the City Council of Burley; CITY OF HEYBURN, HAROLD R. HURST, Mayor of the City of Heyburn; and WILFORD WILCOX, DEAN BAKER, DAVID MAYES, and LARRY MCCOMB, as members of the City Council of Heyburn,

*Respondents.*

No. 14719

Boise, May Term, 1983
Filed: September 26, 1983
Frederick C. Lyon, Clerk

RICHARD H. BOHLE and PAULA L. BOHLE, husband and wife; BLAINE JENSEN and LILLIAN D. JENSEN, husband and wife; CHARLES B. PARK and BILLIE F. PARK, husband and wife; CLARENCE F. BELLEM and LILLIAN B. BELLEM, husband and wife; MAGIC VALLEY FOODS, INC., an Idaho corporation; CAMERON SALES, INC., an Idaho corporation,

*Petitioners,*

v.

CITY OF RUPERT, WILLIAM F. WHITTOM, Mayor of the City of Rupert, CLARK CAMERON, DWINELLE E. ALLRED, JUNE DOMBECK and RONALD E. KLEBE, as members of the City Council of Rupert.

*Respondents.*

No. 14809

Original proceeding: Petition for Writ of Prohibition.

Petition for Writ of prohibition to prevent cities from increasing municipal electric rates to pay debt obligation of allegedly unauthorized electric power contract. Alternative writ made permanent.

Craig Meadows and Phillip M. Barber of Boise, for petitioners Asson, et al.

Roger D. Ling of Rupert for petitioners Bohle, et al.

William Parsons of Burley for respondent City of Burley. Stephen A. Tuft of Burley for respondent City of Heyburn.

Donald J. Chisholm of Burley for respondent City of Rupert.

A. L. Smith of Idaho Falls for intervenor City of Idaho Falls.

Peter B. Wilson of Bonners Ferry for intervenor City of Bonners Ferry.

R. B. Kading, Jr., and R. M. Turnbow, of Boise, for intervenor Washington Public Power Supply System.

Howard Humphrey, and Stanley Welsh, of Boise, for intervenor Chemical Bank.

HUNTLEY, J.

In 1976, five Idaho cities[1] (parties to this action) entered into an agreement with the Washington Public Power Supply System (WPPSS) for future supplies of electrical energy to be generated by two planned nuclear power plants. Although the plant projects were later terminated, under the terms of the agreement the cities were nevertheless required to continue to pay their percentage shares of the bond obligations incurred, amounting to millions of dollars. Residents and purchasers of electricity of three of the five cities brought this petition for a writ of prohibition, pursuant to this Court's authority under Idaho Const. Art. 5, § 9 and I.C. §§ 7-401, 402, to prevent the respondent cities from raising municipal electric rates to cover their payment obligations. The petitioners allege the cities acted without constitutional authority when entering into the 1976 agreements.

The record shows that each of the five Idaho cities owns and operates an electrical distribution system that carries electricity within the city and to nearby areas.[2] However, only two of the cities have generating facilities (Idaho Falls and Bonners Ferry), and those facilities do not supply all of their power needs. Thus, each of the five cities relies on outside electricial power supplies. Since 1963 (and before, for several cities) the outside supplier has been the federal government, through its agency the Bonneville Power Administration (BPA). The BPA provides the Pacific Northwest region with comparatively inexpensive hydroelectric power generated at facilities along the Columbia River system.

In the late 1950's and early 1960's, Pacific Northwest cities were receiving forecasts of greatly increased future energy demands. It was expected that the Northwest's hydroelectric resources would soon be inadequate to meet the needs of the region's power users. During this period, and through the late 1960's and into the 1970's, cooperative efforts were made by electricity purchasers such as municipalities and utility districts to predict the region's future energy needs and to make plans to

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[1] Burley, Rupert, Heyburn, Idaho Falls and Bonners Ferry (the latter two are in the suit as intervenors).

[2] The essential facts were submitted by stipulation of all parties.

meet them. Organizations such as the Public Power Council and the Pacific Northwest Utilities Conference Committee involved utilities in the region in energy forecasting and planning activities.[3] Another organization, the Joint Power Planning Council, including BPA and many of its power customers, made a study of future energy requirements and concluded that new electrical generating plants would have to be built to keep pace with increasing power demands. A plan was developed which called for the construction of several thermal power plants.

In January 1971 and 1973, and September 1973, the five Idaho cities, together with other Pacific Northwest utilities, entered into agreements with WPPSS to purchase electrical "project capability" from three nuclear power plants to be constructed by WPPSS.[4] Financing for the three nuclear plants was arranged under a plan called "net billing." The cities were to purchase shares of project capability from WPPSS, payment for which was to be made out of city utility revenues. The cities would then assign their project capability to BPA, which would reimburse the cities by reducing their wholesale power bills in

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[3] The Pacific Northwest Utilities Conference Committee was comprised of 130 public and private utilities in the region. Each year it published the "West Group Forecast," a compilation of forecasts of "load growth" from each of the utilities in the region. Those forecasts supported predictions of power shortages by the 1980's.

[4] WPPSS is a municipal corporation and joint operating agency authorized under Washington state laws to finance, construct, own and operate electrical generating facilities. It was established in 1957 and is composed of 19 public utility districts and four Washington cities. "Project capability" which the utilities contracted to purchase from WPPSS is a percentage share of the potential output of nuclear plants to be constructed. In the agreement it is defined as follows:

> "the amounts of electric power and energy, *if any*, which the projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station uses and losses." (Emphasis added.)

amounts equal to their payments to WPPSS. In this way, BPA would actually fund the WPPSS projects.[5]

Each city entered into the agreement with respect to these first three plants (referred to as Projects 1, 2, and 3) after passage by its city council of a resolution authorizing execution of the agreement. Each city also represented, in the form of an opinion letter from its counsel, that it had authority to enter into the agreements.[6] The cities had specified statutory authorization, by means of a provision enacted in 1971, to participate in a net-billing arrangement and purchase electrical power to be resold to BPA:

> "I.C. § 50-342. *Electric Power—Purchase or disposal.*—In addition to the powers otherwise conferred on cities of this state, a city owning and operating an electric distribution system shall have the authority to purchase electric power and energy for the purpose of disposing of such power and energy to the United States of America, department of the interior, acting by and through the Bonneville power administrator, through exchange, net billing or any arrangement which is used for supplying the needs of the city for electric power or energy, and such authority shall not be subject to the requirements, limitations, or procedures contained in sections 50-325 and 50-327, Idaho Code."[7]

The net-billing financing plan made it possible for BPA to assist in insuring future supplies for its electricity customers. Each participating utility pays WPPSS its share of the costs of

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[5] The participants would pay debt service on the bonds through their monthly payments to WPPSS, and BPA would, in effect, reimburse the participants.

[6] Each city received a form opinion letter from WPPSS which it was required to follow in stating its authorization, as a prerequisite to entering into the agreement.

[7] I.C. §§ 50-325 and 50-327 would have prevented sale of electrical power to BPA by the cities unless it was excess power. I.C. § 50-342 removed that limitation. The section was amended in 1981 and 1982.

developing the projects, and BPA gives the participant a credit in the amount of such payment on the BPA bill for power purchased by the participant.

In December 1973 the Public Power Council investigated the possibility of two additional power plants to be designed, financed and built by WPPSS. For various reasons (one of which was a 1973 Treasury Department ruling denying tax exempt status for bonds to finance additional thermal plants from which BPA would receive more than 25% of the energy output), the two newest plants (Projects 4 and 5) could not be financed under the same arrangements as Projects 1, 2 and 3, which had BPA involvement. During 1974 and the first half of 1975, the Public Power Council, BPA, WPPSS and various utilities discussed possible financing plans for Projects 4 and 5.

Although three nuclear plants were already being built, many Northwest utilities were still convinced that the future would bring energy demands well beyond the output of existing and planned power plants. BPA customers were made aware of a possible "notice of insufficiency" in 1973 and thereafter. The "notice of insufficiency" was an official statement by BPA to its preference customers that it would not be able to supply them with sufficient electricity by the early 1980's. BPA informed its customers that unless a plan were created to provide for future power production it would be forced to issue its notice of insufficiency.[8]

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[8] The notice of insufficiency was finally issued in June, 1976. BPA's letter to the cities stated, in part:

> "Bonneville has completed an analysis of the resources it estimates will be available for disposition and its requirements and commitments to supply firm energy in the year July 1, 1983, to June 30, 1984. As a result of this analysis, Bonneville has determined that the firm energy resources available to it will be insufficient in that year to supply in full the City's firm energy requirements, the firm energy requirements of other preference customers, and Bonneville's obligations to deliver firm energy to its other customers.
>
> Therefore, in accordance with the provisions of the Power Sales Contract, I hereby give notice, effective at 2400 hours on June 30, 1976, that in the year beginning July 1, 1983, and in

The proposed additional nuclear plants were to be located at the same sites as Projects 1 and 3 to reduce costs. Costs were projected to be low in comparison to other alternative power facilities. Impelled by the region's forecasts of energy shortages and the apparent advantageous circumstances of pairing two new plants with projects already under construction, the cities entered into a second set of agreements with WPPSS in July 1976.

The agreements, in summary form, provided that WPPSS would use its best efforts to arrange financing for the two plants, to obtain regulatory permits, to issue and sell bonds, and to complete planning and engineering studies, arrange for construction and timely completion of the plants, and thereafter maintain the plants. Project 4 was to be completed in March 1982, and Project 5 in April 1984. If WPPSS failed to secure financing, or if the plants were not completed as planned, the participating cities were nevertheless bound to pay their obligations. The agreement provided:

> "The Participant shall make the payments to be made to Supply System [WPPSS] under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon performance or nonperformance by Supply System or by any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other [sic] legal or equitable remedy."[9]

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each year thereafter during the term of the Power Sales Contract, Bonneville's obligation to supply firm energy to the City will be limited to an allocation, the amount of which will be computed according to the terms of Section 22 of the General Contract Provisions."

[9] Section 6(d), p. 19 of the agreement, referred to as the "hell or high water clause."

The payment obligation of each city was based on its percentage share of the project capability purchased. The city pays its percentage of the projects' annual budget and fuel costs, including all of WPPSS' cost of ownership, debt service on bonds, and all other costs. The cities' obligation to pay was to begin on the earliest of three dates: (1) continuous operation of any plant; (2) July 1, 1988; or (3) one year after termination of any project.

Projects 4 and 5 were terminated in January 1982 when WPPSS was unable to secure sufficient financing to complete the plants. At the time, Project 4 was approximately 20% complete and Project 5 was approximately 16% complete.[10] Bonds had been issued by WPPSS in the amount of $2.25 billion.[11]

Under the agreement, the cities' payment obligations are limited to revenues derived from the operation of their utility systems. Each participant agrees to establish, maintain and collect electrical charges adequate to cover its payment obligations. In the event a participant defaults, provision is made for the non-defaulting participants to assume payment of the defaulter's obligation, up to a maximum of 25% of their own obligations.

As they had done with Projects 1, 2 and 3, the cities submitted opinion letters stating they were authorized by law to enter into the Project 4 and 5 agreements. Although the two sets of agreements were essentially the same (both involved the purchase of project capability, under the same terms, and both contained the so-called "dry-hole liability" provision), the financing arrangements were different in one important aspect—involvement of BPA. In the Project 4 and 5 agreements,

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[10] The WPPSS Board of Directors and Executive Board terminated the projects by adoption of Resolutions no. 1203 and no. 34, giving as the reason WPPSS' inability to proceed due to financing conditions beyond its control.

[11] Each city's share of the principal amount of the bonds sold is as follows: Burley, $4.275 million; Rupert, $7.290 million; Heyburn, $5.782 million; Idaho Falls, $20.587 million; Bonners Ferry, $4.275 million.

the cities are ultimately liable for the "dry-hole" risk, whereas in the earlier agreements the cities incur no expense for which they do not obtain electrical power in like amount from BPA. In that sense, the Project 1, 2 and 3 agreements were similar to power purchase contracts. The cities received electricity in proportion to their payments to WPPSS.

Petitioners allege the cities acted in violation of the Idaho Constitution, Art. 8, §§ 3 and 4, and Art. 12, § 4, when they entered into the Project 4 and 5 agreements. Since our analysis of the applicability of Art. 8, § 3 is dispositive of the case, we need not address the other constitutional provisions. Art. 8, § 3 states:

> "Limitations on county and municipal indebtedness —*No* county, *city,* board of education, or school district, or other subdivision of the state, *shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void:* Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds (⅔) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and

interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district." (Emphasis added.)

Since it is admitted that no election was held by any of the five cities to obtain approval of the electorate prior to entering into the agreements in question, petitioners contend the cities contracted indebtedness in violation of the Idaho Constitution, and their indebtedness or liability is therefore void. Respondent City of Heyburn and intervenors WPPSS and Chemical Bank[12]

[12] Chemical Bank, a New York corporation, is trustee for the holders of bonds issued by WPPSS to finance construction of Projects 4 and 5.

argue, however, that Art. 8, § 3 does not apply to the financing arrangement in this case because that provision contemplates an indebtedness for which taxes would need to be assessed, and the cities' payment obligations here are to be satisfied out of utility revenues alone.

Such an interpretation, however, would ignore the plain language of the constitutional provision, which states that "[n]o . . . city . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof. . . ." While it is true that the provision goes on to add another requirement, relating to the collection of an annual tax to pay interest on the debt and a sinking fund to pay the principal, the latter requirement is simply sound fiscal policy and does not relate to the primary constitutional mandate of electorate approval of substantial and far-reaching municipal indebtedness. A financing plan which provides for amortization of the indebtedness by some means other than assessment of taxes might be held to satisfy that part of Art. 8, §3 which calls for an assessment, but it cannot fulfill the requirement of voter approval.

City of Heyburn, WPPSS and Chemical Bank also contend that Art. 8, §3 would be inapplicable under the rule distinguishing municipal indebtedness from "special fund" indebtedness.

It is urged that we overrule Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1912), and apply the "special fund" doctrine in this case. That doctrine, accepted by a great majority of cases,[13] holds that a municipality does not contract indebtedness or incur liability, within the constitutional limitation, by undertaking an obligation which is to be paid out of a special fund consisting entirely of revenue or income from the

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[13] For a list of other jurisdictions applying the special fund doctrine, see Moore, Constitutional Debt Limitations on Local Governments in Idaho—Article 8, Section 3, Idaho Constitution, 17 Idaho L. Rev. 55, 65 n. 50 (1980).

property purchased or constructed. *Feil* dealt with a decision by the city of Coeur d'Alene to purchase a municipal water system, to be financed by bonds which would be repaid out of a fund containing only the revenues derived from operation of the water works. It was argued that since no indebtedness was contracted by the city itself—but rather only by the bond fund—the expenditure did not come under Idaho Const. Art. 8, §3. The *Feil* court rejected that argument, reasoning that Idaho's expansive constitutional provision (which, unlike several other states' examined by the court, contained the word "liability" as well as "debt") included an indebtedness paid out of a fund separate from the city's general fund. The court was critical of "subtleties and refinements of reasoning" utilized to suggest that no liability is incurred where a special fund is involved. 23 Idaho at 49, 129 P. at 649. Since *Feil,* a series of cases have declined to apply the special fund doctrine. *See,* Boise Development Co. v. Boise City, 26 Idaho 347, 143 P. 531 (1914); Miller v. City of Buhl, 48 Idaho 668, 284 P. 843 (1930); Williams v. City of Emmett, 51 Idaho 500, 6 P.2d 475 (1931); Straughn v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 321 (1932); O'Bryant v. City of Idaho Falls, 78 Idaho 313, 303 P.2d 672 (1956).

However, *Feil* and its quite extensive succession of authority no longer prevent application of the special fund exception because that exception has been made a part of Idaho law by way of amendments to Art. 8, § 3. *See,* Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).[14] The first such amendment, passed in 1950, authorized cities to purchase or construct water and sewage systems, treatment plants, and off-street parking facilities to be financed by bonds, "the principal and interest of which to be paid solely from revenue derived from rates and charges for the use, and the services rendered by, such systems, plants and facilities . . ." Subsequent

[14] The court stated "furthermore any doubt as to the precedential value of the *Feil* opinion has been removed by subsequent amendments by the people of this state to Art. VIII, §3, which now authorizes a municipality to do what was impermissible at the time the case was decided," citing to Schmidt v. Village of Kimberly, 74 Idaho 48, 256 P.2d 515 (1953). 97 Idaho at 558, 548 P.2d at 58.

amendments have increased the scope of the special fund exception to include port districts (1964), public recreation facilities (1966), air navigation facilities (1968), and rehabilitation of existing electrical generating facilities (1976). We note that, with the exception of port districts, indebtedness of a city for any of the purposes listed, even though not subject to the tax assessment provision of Art. 8, § 3, is nevertheless specifically conditioned on voter approval. The intent of the framers of the constitutional amendments, and the electorate through their ratification, is clear that approval of a municipality's qualified voters is necessary whether its Art. 8, § 3 indebtedness or liability is against the general fund of the city, and its tax revenues, or limited to a special fund of project-generated revenues.

It might be argued that since Art. 8, § 3 provides for "rehabilitation of existing electrical generating facilities" and makes no mention of construction of new facilities or indirect financing of new facilities through purchase of project capability, the latter purposes are not covered by the requirements of that section. However, it seems unreasonable to believe that the framers and ratifiers of the amendments intended for a city to obtain assent from a majority of its qualified voters to rehabilitate or repair its electrical plant and yet not obtain voter approval of the financing of completely new generating facilities, at perhaps several times the cost.

The better view is that the constitutional provision requires a city to obtain only a simple "majority" voter approval where the indebtedness undertaken is only for the rehabilitation of existing facilities (a purpose more similar to the "ordinary and necessary expenses" exception), whereas if the indebtedness is for the construction of wholly new facilities (obviously a much more extensive undertaking), then the "two thirds (⅔)" majority approval within the general application of the article would apply. This interpretation is substantiated by the 1972 amendment which divided the special fund exceptions into two groups: those requiring two-thirds voter approval and those requiring only a simple majority.[15] When the provision cov-

[15] H.J.R. No. 73, 1972 Idaho Sess. Laws p. 1251.

ering the rehabilitation of existing electrical generating facilities was added in 1976, it was placed within the second group.

Reasoning *a fortiori,* we cannot conceive of an interpretation of Art. 8, § 3 which would sanction the extensive, long-term indebtedness undertaken by the cities herein without an election.[16] Art. 8, § 3, if it has application to a city's issue of bonds to finance rehabilitation of its electrical generating facilities, surely applies to a city's guaranty of bonds issued to construct two new nuclear power plants.

Thus, were we to accept the argument that the cities' liability comes under the special fund doctrine, the indebtedness would still be without constitutional authority because Art. 8, § 3, requires voter approval of qualifying indebtedness regardless of the method or source of repayment. However, we do not believe the special fund exception is applicable here. The special fund doctrine is normally applied in situations where the city's indebtedness is for the purpose of building or buying revenue-producing property, and only the revenue produced from that particular property is used to repay the indebtedness. For example, a city might issue bonds to fund construction of a power generating station, the bonds being repayable from income generated by the power station. Such financial undertakings might be said to "pay for themselves," leaving no possibility of obligation on the city's general fund (requiring replacement by additional taxation). In the present case, the cities' obligation to pay off the WPPSS bonds

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[16] The amortized monthly cost of each city's share of the $2.25 billion bond obligation, over 30 years, is:

Burley, $29,752.00 per month,
Rupert, $50,735.00 per month,
Heyburn, $40,244.00 per month,
Idaho Falls, $143,279.00 per month,
Bonners Ferry, $29,752.00 per month.

Simple mathematics reveals overall indebtedness ranging from a low of $10,710,720.00 for Burley and Bonners Ferry, to a high of $51,580,440.00 for Idaho Falls. It is unthinkable to suggest that a constitutional provision intended to require voter approval of any debt which exceeded the income provided for it during one year does not apply to a $10.7 million debt for a city of 1,906 people (Bonners Ferry, 1980 census).

has created no revenue-producing property. The cities receive no electrical power for their monthly payments to WPPSS, and must raise their rate charges on power they already purchased to create a fund out of which to pay WPPSS. In essence, they must impose a surcharge on their rate-paying residents and other electrical power users, for which they provide no additional service.[17] Indeed, far from qualifying as a special fund exception, this indebtedness might constitute a general obligation on the city for which it has nothing to show.[18]

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[17] To the extent this surcharge imposes an obligation on the rate-payer unrelated to the quantity of electricity used, it could constitute a tax. Supposing the extremely unlikely situation of there being only one rate-payer in the municipality, or of the whole group of rate-payers passing a month without using any electricity, under the terms of its agreement with WPPSS, the city would be compelled to charge a "rate" sufficient to make its monthly payment to WPPSS no matter how unreasonable it would be as to the single rate-payer, or in spite of the fact that no service was provided. The supposition may be fanciful, but it serves to illustrate the nature of the revenues collected by the city; they are not properly "utility revenues." *See,* 12 McQuillin, *Municipal Corporations* § 35.38 (1970).

[18] In light of the contractual requirement that non-defaulting participants assume the burden of paying a defaulting participant's share (up to 25% of their individual shares), there arises the question of a defaulting municipality's liability to its fellow participants, which may elect to sue it. They would not be bound as WPPSS is to recovery only against the special fund, the agreement providing:

> "If the Participant shall fail or refuse to pay any amounts due to Supply System hereunder, the fact that other Participants have assumed the obligation to make such payments shall not relieve the Participant of its liability for such payments, and the Participants assuming such obligation, either individually or as a member of a group, shall have a right to recovery from the Participant. Supply System or any Participant as their interests may appear, jointly or severally, may commence such suits, actions or proceedings, at law or in equity, including suits for specific performance, as may be necessary or appropriate to enforce the obligations of this Agreement against Participants, which obligations shall include reasonable attorneys' fees in all trial and appellate courts." Section 17(e), pp. 48-9.

If other participants, either individually or as a group, bring an action against a defaulting municipality, a judgment obtained in the action would be assessed against the city (as opposed to its utility service, or revenues therefrom) as the contracting entity, and recoverable from the city's general fund.

We now address the contention of WPPSS, Chemical Bank, and the City of Heyburn that the cities' indebtedness is excepted from the requirements of Idaho Const. Art. 8, § 3 by virtue of its being an "ordinary and necessary" expense. That proviso reads as follows: "Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . ." In our interpretation of this language, we are benefitted by a rather extensive history of case law. We note at the outset that this proviso consists of two requirements: (1) that the expense be ordinary and necessary, and (2) that it be authorized by the general laws of the state. City of Pocatello v. Peterson, 93 Idaho 774, 777, 473 P.2d 644, 647 (1970). We will address the "ordinary and necessary" requirement first.

Early cases interpreted the "ordinary and necessary" language very narrowly. The court often looked to the amount of the expense in proportion to the city or county's revenue for that year. In County of Ada v. Bullen Bridge Co., 5 Idaho 79, 47 P. 818 (1896), the court stated,

> "If it is claimed that this expenditure comes within the proviso of section 3, article 8, of the constitution, we answer that a construction of that proviso, as well as of the entire section, was given by this court in Bannock Co. v. Bunting, 4 Idaho, 156, 37 Pac. 277, and we would suggest that an improvement involving an expenditure of nearly $40,000, where the revenue of the county for the year was only about $70,000, would not readily be classed as an 'ordinary and necessary expense.' It would be difficult, we apprehend, to name an expense under such a construction that would not be 'ordinary and necessary.' If a necessity existed for the bridge, there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is

difficult to see what protection the people will have." *Id* at 90, 47 P. at 823.[19]

*See also,* Ball v. Bannock Co., 5 Idaho 602, 51 P. 454 (1897). Expenditures held *not* to be ordinary and necessary include: the construction of bridges, *Bullen Bridge, Dunbar, supra;* construction of a wagon road, McNutt v. Lemhi Co., 12 Idaho 63, 84 P. 1054 (1906); purchase of a water system, Woodward v. City of Grangeville, 13 Idaho 652, 92 P. 840 (1907); construction of a schoolhouse addition, Petrie v. Common School Dist., 44 Idaho 92, 255 P. 318 (1927); purchase of a street sprinkler, Williams v. City of Emmett, 51 Idaho 500, 6 P.2d 475 (1931). Expenditures held to be within the ordinary and necessary exception include: salaries of city officers and employees, Butler v. Lewiston, 11 Idaho 393, 83 P. 234 (1905); repair of city waterworks, Hickey v. City of Nampa, 22 Idaho 41, 124 P. 280 (1912); construction of a jail in a newly created county, Jones v. Power Co., 27 Idaho 656, 150 P. 35 (1915); maintenance of streets, Thomas v. Glindeman, 33 Idaho 394, 195 P. 92 (1921); cost of employing school teachers, Corum v. Common School Dist., 55 Idaho 725, 47 P.2d 889 (1935).

Comparison of these earlier cases reveals one clear distinction between those expenses held to be ordinary and necessary and those held not to be: *new* construction or the purchase of *new* equipment or facilities as opposed to repair, partial replacement or reconditioning of existing facilities. Thus, the court could hold that the city of Grangeville was not authorized, except by compliance with the requirements of Art. 8, § 3, to purchase an existing water system from the estate of a

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[19] In the *Bunting* case, the court held that the purchase of a site for a county courthouse, and building a courthouse, "is clearly not among the ordinary and necessary expenses of the county . . . . It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of $4,000, they might purchase one at a cost of $10,000, and proceed to erect a courthouse at a cost of $20,000, all of which would be in direct violation of the constitution." *See,* Dunbar v. Board of Commrs., 5 Idaho 407, 49 P. 409 (1897). The *Bunting* court looked less to the nature of the expense than to the amount.

deceased city resident in the *Woodward* case, *supra*,[20] but could hold that the city of Nampa was authorized (without voter approval) to repair and restore its present water system after it was badly damaged in an attempt to put out a downtown fire in the *Hickey* case, *supra*. Similarly, the city of Moscow's decision to *improve* its existing waterworks system and build a water storage tank, to provide a "more adequate water supply" was within the application of Art. 8, § 3 of the Constitution. Durand v. Cline, 63 Idaho 304, 119 P.2d 891 (1941). *See also,* Miller v. City of Buhl, 48 Idaho 668, 284 P. 843 (1930), (purchase of electric generating system, to be paid for from receipts from sale of power and light, held to be required to comply with Art. 8, § 3); O'Bryant v. City of Idaho Falls, 78 Idaho 313, 303 P.2d 672 (1956), (entering into agreement with natural gas distribution system to provide gas for city residents and vicinity held to be covered by requirements of Art. 8, § 3, Idaho Const.); Straughan v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 421 (1932), (purchase by city of municipal lighting plant, and of waterworks system, held to be within application of Art. 8, § 3); Reynolds Construction Co. v. County of Twin Falls, 92 Idaho 61, 487 P.2d 14 (1968), (construction of courthouse annex covered by Art. 8, § 3).

While it is true that recent cases dealing with application of Idaho Const. Art. 8, § 3, have interpreted the "ordinary and necessary" language more broadly,[21] they are not inconsistent with earlier case authority. In Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968), the court held that establishment of a "policeman's retirement fund" was within the ordinary and necessary proviso, reasoning that it was merely an extension of the city's salary compensation and support of its

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[20] "It will thus be seen that the ordinary and necessary expenses of said municipality may be contracted for by said city without any vote of the people, but where an expense is proposed to be incurred which exceeds the income and revenue provided for any year, such as the construction or purchase of a water system, or a part of such system, the same cannot be done without the assent of two-thirds of the qualified electors of said city." 13 Idaho at 660, 92 P. at 842.

[21] *See,* Moore, *Constitutional Debt Limitation, supra.*

municipal law enforcement staff. Early cases were clear in ruling that salaries of municipal employees and related expenses are ordinary and necessary. *See,* Corum v. Common School Dist., *supra;* Butler v. Lewiston, *supra.*

In City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970), the court held that while repair and renovation of a municipal airport were not "inherently 'ordinary and necessary expenses' " the particular facts of that case brought them within the constitutional category. In its opinion the court stressed the upkeep and maintenance aspect of the city's expenditure. The court noted that the passenger terminal was an "unsound structure." Thus, while construction of a "wholly new terminal building" (see dissent of McFadden, J., *id.* at 779, 473 P.2d at 649) might be viewed as an expenditure not traditionally considered ordinary and necessary, the court's emphasis on the obsolescence and unsafe condition of the twenty-year-old facility places it within the "repair or maintenance" line of case authority. The court may have considered the expenditure in light of the city's obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense. *See,* Butler v. City of Lewiston, *supra.*

The question is whether the cities' belief that there would be inadequate power supplies several years in the future is sufficiently analogous to the cases which hold that repair or reconditioning of existing facilities is an ordinary and necessary expense. It is argued that the expenditure was certainly necessary in light of BPA's notice of insufficient power supplies by 1983. Although hindsight tells us the cities were mistaken (there has turned out to be more than adequate electrical power from the same facilities existing in the early to mid 1970's), there is no way the cities could have known otherwise from existing information. However, we need not decide whether the expenditure was "necessary" within the meaning of Art. 8, § 3, for we hold that it was not "ordinary." "Ordinary" means "regular; usual; normal; common; often recurring . . . not characterized by peculiar or unusual circumstances." *Peterson,*

*supra,* 93 Idaho at 778, 473 P.2d at 648. It would be difficult to apply these adjectives to the WPPSS agreement. It was a colossal undertaking, fraught with financial risk. It was open-ended: the cities could not have known what their ultimate debt or liability would be. One cannot stretch the meaning of "ordinary" to include an expense for which there could not be, until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness—yet no ownership, and minimal control, and only the possibility of electricity. Further, the agreement was for the construction of nuclear power plants, at an expense unencountered in the history of these cities' power ventures. One could conceive of a number of words to describe this undertaking, but "ordinary" would not be one of them.

We turn now to the second requirement of the constitutional proviso: that the expenditure be authorized by the general laws of the state. While an Idaho municipality is authorized to "acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city", I.C. § 50-325, and may purchase for resale to BPA "electric power and energy" under a net-billing agreement, I.C. § 50-342, we can find no statutory authorization for the purchase of "project capability" where such purchase comprehends the payment of long-term indebtedness for which no power may be supplied, and for which no ownership interest is acquired. The municipality is neither acquiring, owning, maintaining, or operating a plant, nor purchasing electrical power. It is underwriting another entity's indebtedness in return for merely the possibility of electricity. Thus, we hold that the agreement entered into by the Idaho cities and WPPSS does not come within the ordinary and necessary proviso of Art. 8, § 3 of the Idaho Constitution, and that section consequently having application in this case, the agreement is void as to the cities, who were acting *ultra vires* by obligating their residents without an election and compliance with the constitution.

We note that we have had at issue before us only the agreement relating to Projects 4 and 5. The cities' authorization

to enter into Project 1, 2 and 3 agreements is not at issue, and as we have pointed out, the two sets of agreements are sufficiently different to make much of our holding not applicable even by analogy to the earlier agreements, which we perceive to be in the nature of power purchase contracts more than long-term debt obligations. Since we hold that the cities' agreements as to Projects 4 and 5 are void, it follows that the alternative writ of prohibition in these consolidated cases is hereby made permanent.

DONALDSON, C.J., SHEPARD and BISTLINE, J.J., concur.

BAKES, J., dissenting:

I cannot join in the majority opinion. If viewed at the time of inception, instead of with hindsight, the contracts under analysis here should withstand any constitutional attack the petitioners could muster. It is only because, through hindsight, the majority can see what a "bad deal" the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case. Clearly, the contracts under consideration comply with any constitutional requirement. Analysis under Art. 8, § 3, reveals that (1) the obligation under the agreements is not the type of obligations contemplated under Art. 8, § 3; and (2) that even if the above reason fails, the agreements should still be upheld under the "ordinary and necessary" exception to the requirement of a citizens' election. Analysis under Art. 8, § 4, and Art. 12, § 4, leads to the same conclusion. Those sections do not invalidate these agreements because (1) the agency with whom the cities contracted is a public agency, and those sections merely prohibit contracts with private entities; and (2) there can be no lending of the credit of a public entity if the general fund of that entity is not liable on the obligation. Because these agreements withstand scrutiny under all of these constitutional provisions, the agreements should be upheld.

This is not to say that the cities are liable on these contracts. Our only concern in this case is the constitutionality of the cities' actions in entering into these contracts. This opinion would not preclude the cities from asserting any defenses to formation of these contracts that they might bring in another forum. In fact, it appears from the record that these cities have been discharged by a Washington trial court because of the action of the Washington Supreme Court in invalidating the contracts as to the Washington defendants. We should not bend our own Constitution in an effort to release from liability public entities who have improvidently, but constitutionally, entered into contracts from which they may also be relieved because of contractual defenses.

## I

### A

The obligation "incurred" by the cities under these agreements is not the type of "indebtedness or liability" contemplated by Art. 8, § 3. That section contemplates the type of liability or indebtedness that will be repaid by the collection of an annual tax. Thus, the section provides some protection for the taxpayers who will be required to pay such annual tax. It requires cities to go to those taxpayers and obtain their assent to the liability or indebtedness incurred by submitting the matter to an election. However, under these agreements, no tax will ever by required. The liability in question is not payable from the general funds of the city. By the terms of the contract itself, it is payable only from revenues obtained from the sale by the cities of electric power. The sole source of revenue from which the cities are obligated to make payment to WPPSS is the electric utility rates charged only to customers of the electric utilities operated by the cities, most but not all of whom are located within the cities. No tax funds are ever involved under this contract. Because this obligation can never be a liability on the general city fund, it is not the type of liability contemplated under Art. 8, § 3; thus, Art. 8, § 3, should not render the agreement void.

**B**

Another reason exists that should validate the Participants' Agreements under Art. 8, § 3. That section provides for an exception to the requirement of a citizens' election where the liabilities are "ordinary and necessary expenses authorized by the general laws of the state." The agreements were contracts for the acquisition of electricity. These participant cities were lawfully in the business of providing electricity to their residents and surrounding areas, and faced with a future shortage of electricity, the entering into of these agreements to provide a future source of electricity was an "ordinary and necessary" function of a city's business of providing such electrical power.

This Court has recognized that the "ordinary and necessary" exception shall be applied on a case by case basis. The cases considered by this Court have defined "ordinary and necessary" in various ways.

> " 'Ordinary' means 'regular; usual; normal; common; often recurring . . . .' . . . 'Necessary' means 'indispensable.' . . . An expenditure, although not of a frequently recurring nature, may nonetheless be 'ordinary and necessary' " City of Pocatello v. Peterson, 93 Idaho 774, 778, 473 P.2d 644, 648 (1970).

This Court later defined "ordinary and necessary" as follows:

> "An expense is ordinary if *in the ordinary course of the transaction of municipal business,* or the maintenance of municipal property, *it may be and is likely to become necessary.*" (Emphasis added.) Thomas v. Glindeman, 33 Idaho 394, 195 P. 92 (1921).

In City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970), we considered the question of whether a contract for the expansion of an airport facility was a contract for "ordinary and necessary" expenses within the exception to Art. 8, § 3. This Court considered several factors in the peculiar factual circumstances and concluded that the city's lease of the airport facility was ordinary and necessary. Several of the factors considered were: (1) the fact that the city was author-

ized by law to operate an airport; (2) that the city had in fact been operating an airport for a considerable period of time; and (3) that the existing facilities were inadequate and would in the future become obsolete and unsafe. The Court then concluded that for all of these reasons the repair and improvement of Pocatello's airport facility constituted an ordinary and necessary expense, thus falling within the exception to Art. 8, § 3. In its conclusion, the Court noted the following:

> "Furthermore the repair and improvement of the Pocatello airport facility is essential for the proper growth and development of the area. This is especially so since the railroads, upon which public travel and communications were heavily dependent in yesteryear, are discontinuing passenger service to many cities." 93 Idaho at 779.

The factors noted in *City of Pocatello* in finding those expenses to be ordinary and necessary are also applicable in the contextual framework involved here. The cities here are authorized by law to operate electrical power plants and purchase electrical power for distribution to residents of the city. *See* I.C. §§ 50-325 and -342. All of these cities are in the business of distributing electrical power to their residents. Their residents are thus dependent upon these cities for their supply of electrical power. The source of power previously used by the cities was in effect becoming "obsolete," in that the BPA, from whom the cities had previously purchased their electrical power, had notified them that it would no longer be able to meet their electrical power needs by the early 1980's. The cities therefore were required to seek alternative sources of electrical power in order to continue service to their residents. All of these factors considered together indicate that this case is substantially similar to the question considered in *City of Pocatello v. Peterson, supra.* The liability incurred by the city was thus an ordinary and necessary expense, and the agreements do not violate Art. 8, § 3, of the Idaho Constitution and should not be struck down.

## II

### A

The majority opinion does not discuss Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, but the agreements also withstand scrutiny under those sections. Those provisions read:

> "[Art. 8] § 4. County, etc., not to loan or give its credit.—*No* county, *city,* town, township, board of education, or school district, or other subdivision, *shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual association or corporation, for any amount or for any purpose whatever,* or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state." (Emphasis added.)

> "[Art. 12] § 4. Municipal corporations not to loan credit.—*No* county, town, *city* or other municipal corporation, by vote of its citizens or otherwise, *shall ever* become a stockholder in any joint stock company, corporation or association whatever, or *raise money for, or make donation or loan its credit to, or in aid of, any such company or association:* provided, that cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom its proportion to the whole amount so invested." (Emphasis added.)

Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, are both sections intended to limit the power of municipal corporations to lend or pledge their credit to outside entities. Art. 12, § 4, prohibits the lending of credit, but makes a specific exception for indebtedness for "school, water, sanitary and *illuminating purposes.*" Art. 8, § 4, "goes further and is more restrictive" than Art. 12, § 4, Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960). It

absolutely prohibits the lending or pledging of credit directly or indirectly for any purpose whatever.

These two constitutional provisions have been interpreted in numerous Idaho cases. This Court has interpreted these provisions as prohibitions upon the lending of credit in aid of "private" associations or corporations. *See* Board of County Comm'rs v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975); Village of Moyie Springs v. Aurora Mfg. Co., *supra;* School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co., 30 Idaho 400, 164 P. 1174 (1917). As we stated in Boise Redevelopment Agency v. Yick Kong, 94 Idaho 876, 499 P.2d 575 (1972):

> "The purpose of such a prohibition is clear. Favored status should not be given any private enterprise or individual in the application of public funds. The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional sections in question. It was feared that private interests would gain advantages at the expense of the taxpayers. This fear appeared to relate particularly to railroads and a few other large businesses who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution. we are led to the firm conviction that only private interests were intended to fall within the strictures of those sections relating to 'association,' 'corporation' and 'joint stock company.' " *id.* at 883-84.

In *Yick Kong* we were considering the constitutionality of the creation of a redevelopment agency intended to rehabilitate the downtown area of the City of Boise. We held that the redevelopment agency, being a public and not a private enterprise, did not fall within the strictures of Art. 8, §4, and Art. 12, §4. We recently reaffirmed *Yick Kong* in Idaho Falls Consolidated Hospitals v. Bingham County Board, 102 Idaho 838, 642 P.2d 553 (1982). There we said:

> "A review of the proceedings at the constitutional convention, the history of the west, and a similar statute that was in effect at the time the constitution was adopted, show that the delegates only sought to prevent private interests from gaining advantage at the expense of the taxpayer." 102 Idaho at 842.

In the present case WPPSS is not a private entity. Rather, it is a public corporation established by nineteen public utility districts in the State of Washington and the cities of Seattle, Tacoma, Richland and Ellensburg, and incorporated under the laws of the State of Washington. Thus, the evil sought to be avoided in Art. 8, § 4, and Art. 12, § 4, the lending of public credit to private enterprise, is not present here. Significantly, even if an incidental benefit to a profit-making enterprise is present, that in itself will not invalidate a program that has a public purpose. "Only if private interests are primarily benefited, must such programs with public goals be invalidated." Board of County Comm'rs v. Idaho Health Facilities Authority, *supra*. Here, although the argument may be made that certain private entities are benefited by the participation of the cities in the WPPSS agreement, the primary benefit of the agreements inures to the public users of electrical power. Thus, in the present case, and under these facts, there is no violation of Art. 8, § 4, or Art. 12, § 4.

A final reason for upholding these contracts lies in the arguments already presented. Art. 8, § 4, and Art. 12, § 4, both require a lending or pledging of the credit of the municipality. There can be no lending or pledging of that credit if the general fund itself is not liable on the obligation. As shown before, this obligation is payable only out of revenue from the utilities operated by the cities; thus, no general fund is liable. This is not the type of situation envisioned in these two articles of our Constitution.

Thus, under any analysis of these agreements and our Constitution, they should withstand scrutiny and should be enforced.

# APPENDIX B

## APPENDIX B

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | |
|---|---|
| GARY ASSON and LERAE ASSON, *et al.*<br>*Petitioners,*<br>*—against—*<br>CITY OF BURLEY, *et al.*,<br>*Respondents.* | **CONSOLIDATED CASES**<br>**Supreme Court No. 14719** |
| RICHARD H. BOHLE and<br>PAULA BOHLE, *et al.*,<br>*Petitioners,*<br>*—against—*<br>CITY OF RUPERT, *et al.*,<br>*Respondents.* | **Supreme Court No. 14809** |

## MEMORANDUM IN SUPPORT OF CHEMICAL BANK'S PETITION FOR REHEARING

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## MEMORANDUM IN SUPPORT OF CHEMICAL BANK'S PETITION FOR REHEARING

The decision of this Court filed September 26, 1983, holds that the Participants' Agreements for WPPSS Projects 4 and 5 executed by the cities of Bonners Ferry, Burley, Heyburn, Idaho Falls and Rupert are void because the cities, in entering into the agreements, failed to comply with Article 8, Section 3 of the Idaho Constitution.

The Court found that the agreements constituted "indebtedness or liability" incurred without the two-thirds vote of electors required by the constitutional provision, and that the agreements did not fall within the "ordinary and necessary expense" exception to the provision.

The writ of prohibition made permanent by the Court to effect its decision prohibits and restrains the five cities from

> "charging any electrical consumer any rate or charge that would inure to the payment of *any obligation,* liability or indebtedness relating to Nuclear Power Plant Projects Nos. 4 and 5 generated by the [Participants'] Agreements . . . ". (Emphasis added.)

The result of that writ is to wreak havoc with what heretofore the Federal and state constitutions have kept inviolate. The five Idaho cities have not only been freed from their contractual obligations; they have also been relieved of "any obligation" and allowed not to return any part of their share of the $2.25 billion paid for their benefit by bondholders all across this country.

That result cannot stand under the United States and State Constitutions. As the United States Supreme Court put it so directly:

> "The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the

protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' " *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago,* 166 U.S. 226, 236 (1897).

It is fundamental to American jurisprudence, to our whole system of law, that "the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government". *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 324 (1893).

Because of the serious Federal and state constitutional violations that have arisen from the sweeping away of the bondholders' rights and the failure of any conventional state remedies to redress it, Chemical Bank submits this memorandum in support of its motion pursuant to I.A.R. 42 for rehearing. We respectfully petition the Court upon rehearing to vacate the writ of prohibition made permanent by the Court's September 26 decision

## Argument

### I.

### THE FEDERAL CONSTITUTIONAL RIGHTS OF THE BONDHOLDERS HAVE BEEN VIOLATED.

A. **Federal constitutional rights protect against the destruction of contractual expectations by a state.**

The Contract Clause, U.S. Const. Art. I, § 10, cl. 1, the Takings Clause, U.S. Const. Amend. V, and the Due Process Clause, U.S. Const. Amend. XIV, § 1, are interwoven constitutional guarantees all designed to protect the legitimate rights and expectations of property owners, including contractual rights and expectations, from infringement through state law or state action. The Contract Clause prohibits state

law from "impairing the obligations of contracts"; the Takings Clause prohibits the taking of private property for public use "without just compensation"; and the substantive protections of the Due Process Clause prohibit the deprivation of property "without due process of law".

As these doctrines have developed, their substantive protections, and the methods of analysis for applying those protections, have become largely overlapping. *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241 & n.12 (1978) (comparing Contract Clause and Due Process Clause); *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 14-15 (1977) (same); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) (comparing Takings Clause and Due Process Clause); Note, "The Supreme Court, 1977 Term", 92 Harv. L. Rev. 57, 98 (1978) (comparing Contract Clause and Takings Clause); Note, "The Supreme Court, 1976 Term", 91 Harv. L. Rev. 70, 84 (1977) ("constitutional jurisprudence has tended to subsume the [contract] clause under the due process and takings provisions of the fifth and fourteenth amendments"). Three overlapping facets of the Contract Clause, the Takings Clause and the Due Process Clause are particularly relevant here.

*First,* all three constitutional provisions are restrictions on how the application of state laws can affect property rights. The Contract Clause and the Due Process Clause of the Fourteenth Amendment expressly apply to the states. The Takings Clause is applicable to the states through incorporation in the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 160 (1980); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 122 (1978).

Moreover, it is well established that judicial action can constitute the "state action" that violates the Takings Clause or the Due Process Clause.

> "[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and

> authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

*Chicago, Burlington & Quincy Railroad Co. v. City of Chicago,* 166 U.S. at 241. *See also id.* at 233-35. "[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . ." *Hughes v. Washington,* 389 U.S. 290, 298 (1967) (Stewart, J., concurring). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 164 (Takings Clause). *Cf. Shelley v. Kraemer,* 334 U.S. 1, 14-18 (1948) (Equal Protection Clause).[1]

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[1] Early United States Supreme Court cases also applied the Contract Clause to rulings by courts, where those rulings were issued subsequent to the creation of a contract and impaired the obligation of the contract (including municipal bonds). *See, e.g., Ohio Life Ins. & Trust Co. v. Debolt,* 57 U.S. (16 How.) 416, 432 (1854) (opinion of Taney, C.J.); *Gelpcke v. City of Dubuque,* 68 U.S. (1 Wall.) 175, 206 (1864); *Havemeyer v. Iowa County,* 70 U.S. (3 Wall.) 294, 303 (1866); *Butz v. Muscatine,* 75 U.S. (8 Wall.) 575, 583-84 (1869); *Olcott v. Supervisors of Fond du Lac,* 83 U.S. (16 Wall.) 678, 690 (1873); *Pine Grove Township v. Talcott,* 86 U.S. (19 Wall.) 666, 678 (1874); *Douglass v. Pike County,* 101 U.S. 677, 687 (1880). *See generally* B. F. Wright, Jr., *The Contract Clause of the Constitution* at 236-42 (1938). *See also* Hale, "The Supreme Court and the Contract Clause: III", 57 Harv. L. Rev. 852, 862-63 (1944). More recently, however, the Court has restricted its application of the Contract Clause to state legislative action, distinguishing its earlier cases on other grounds. *See, e.g., Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 451-54 (1924); *Barrows v. Jackson,* 346 U.S. 249, 260 (1953).

Chemical Bank does not believe that a judicial/legislative dichotomy in the application of the Contract Clause should be maintained in light of the now well-established understanding that states may not deprive persons of constitutionally protected property rights through judicial decision. Such a dichotomy is particularly unpersuasive given the United States Supreme Court's recent recognition of the overlapping coverage and analysis of the Contract Clause with substantive due process under the Fourteenth Amendment. *U.S. Trust Co. v. New*

*Second,* all three constitutional provisions include contractual rights as property rights to be protected. *See, e.g., U.S. Trust Co. v. New Jersey,* 431 U.S. at 16 (Contract Clause); *id.* at 19 n.16, 29 n.27 (Takings Clause); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 413-15 (Due Process Clause). "The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed." *Murray v. Charleston,* 96 U.S. 432, 449 (1878).

All three constitutional provisions also reach legitimate "expectations" as part of the protected contractual property right. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979) (Takings Clause analysis looks at "interference with reasonable investment backed expectations"); *Penn Central Transportation Co. v. New York City,* 438 U.S. at 124 (looking at the "economic impact of the regulation on the [property owner] and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"); *id.* at 127 ("a state statute . . . may so frustrate distinct investment-backed expectations as to amount to a 'taking' "); *Allied Structural Steel Co. v. Spannaus,* 438 U.S. at 246-50 (impairment of "legitimate contractual expectation" found to violate Contract Clause).

Thus, a contract right may not be so impaired as to take away "the quality of an acceptable investment for a rational investor". *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56, 60 (1935).

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*Jersey,* 431 U.S. at 14-15; *Allied Structural Steel Co. v. Spannaus,* 438 U.S. at 241 & n.12. Moreover, that dichotomy should not apply in this case, since the impairment here was undertaken by officials acting under color of state law.

It is unnecessary, however, to address here the propriety or scope of the judicial/legislative dichotomy under the Contract Clause. Since the protections of the Contract Clause have been recognized by the United States Supreme Court as the equivalent of substantive due process, the analysis and holdings of the Contract Clause cases must be considered as subsumed under the Due Process Clause, which plainly is applicable to officials acting under color of state law and state judicial decisionmaking relating to their conduct.

Constitutionally protected contractual expectations may arise from the contract itself, or they may arise from factors external to the literal terms of the contract. For example, the "contemporaneous state law pertaining to interpretation and enforcement" at the time the contract was entered into is part of the investment-backed expectations of the property owner. *See U.S. Trust Co. v. New Jersey,* 431 U.S. at 19 n.17; *W.B. Worthen Co. v. Kavanaugh,* 295 U.S. at 60. The conduct of government officials, even if insufficient to estop the government, may also "lead to the fruition of a number of expectancies embodied in the concept of 'property' " which cannot be taken without just compensation. *Kaiser Aetna v. United States,* 444 U.S. at 179. As one noted constitutional scholar has explained, the Constitution protects

> "not only what people *in fact expect* upon examining the body of positive [state] law, but also what they are *entitled* to expect, positive law to the contrary notwithstanding. . . . [T]he content of this normative entitlement in the area of private contracts is essentially coextensive with the reach of substantive due process. . . ."

L. Tribe, *American Constitutional Law* § 9-6, at 469 (1978) (emphasis in original) (footnote omitted).

*Third,* all three constitutional provisions override and invalidate any inconsistent state law pursuant to the Supremacy Clause. U.S. Const. Art. VI, § 2. Accordingly, the issue of whether the application of state law to particular facts is correct as a matter of state law is not dispositive of the issue of whether the Federal Constitution has been violated.

**B. The bondholders' "investment-backed expectations" have been totally defeated here in violation of their rights under the Federal Constitution.**

It is clear that the bondholders have property rights —contractual and "investment-backed expectations"—in the present case. Municipal bonds such as those involved in the present case have long been recognized to be contractual in

nature. *See, e.g., U.S. Trust Co. v. New Jersey,* 431 U.S. 1 (1977); *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56 (1935); *Louisiana v. Pilsbury,* 105 U.S. 278 (1882); *Murray v. Charleston,* 96 U.S. 432 (1878). That this should be so is obvious from the nature of the arrangement: the Idaho cities promised to participate, and thus put their credit and financial resources behind the bonds, in exchange for the bargained-for benefit of public marketability of the bonds to finance construction of the two power plants. *See U.S. Trust Co. v. New Jersey,* 431 U.S. at 18.

Whatever else may be included within the contractual property right of the bondholders as derived from the various sources of "investment-backed expectations", it is clearly the case that the bondholders have a constitutionally protected right to obtain the return of their initial investment, plus the interest that equals the time value of that money while the defendants have had its use.

Those "expectations" are constitutionally protected against appropriation without compensation. The "expectations" have been taken or impaired in this case by the denial by the city and ratepayer petitioners that the bondholders have *any* cognizable interest remaining in their investment, a denial which has now been sanctioned by this Court's decision of state law.

The bondholders' constitutionally protected investment-backed expectations were established when they paid their money. They were not changeable depending upon the progress of the projects, whether wildly successful, a tragic failure, or something in between. Neither does the constitutional guarantee of those expectations rise, fall or fluctuate with the progress of the projects. So, for example, had the bondholders' investment been reinvested in an interest-bearing fund, no one would doubt their constitutional right to that fund even in the wake of the decisions made here on the *ultra vires* doctrine and the unavailability of other state remedies.

The fact that the participant cities may now say they are "empty-handed" with respect to the projects changes neither

the benefit they did obtain from the bondholders' investment nor the constitutional analysis protecting the bondholders' expectations. Those cities sought and received their share of the benefit of the bondholders' $2.25 billion investment. Plainly, the bondholders' money was absolutely essential to the nuclear power projects. The risk of failure of the projects was foreseen by everyone; the bondholders' money was nevertheless advanced on the strength of the hell-or-high-water commitments made by the cities. The projects were started and were continued for years because the cities wanted them and more and more bonds were sold so that the cities could further pursue their benefit.

The bondholders never intended to make a gift to the participants. Rather, the bondholders made an investment, based on the representations of the participants—including the Idaho cities—concerning those participants' performance under the contract. Even though the cities have now obtained a judicially sanctioned release from their obligations, they are at a minimum no longer entitled to keep the bondholder's investment. Keeping that investment would be, as bluntly put by the United States Supreme Court, "an act of spoliation" which must not occur because "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions". *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago,* 166 U.S. at 235-36.

Using language of special force and application here, the Supreme Court of the United States long ago rejected, as a matter of Federal Constitutional law, the notion that the cities here could simply walk away from their obligations *and* not repay the money:

> "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold

> payment, the contract should be regarded as an assurance that such a right will not be exercised. *A promise to pay, with a reserved right to deny or change the effect of the promise is an absurdity.*"

*Murray v. Charleston,* 96 U.S. at 445 (emphasis supplied), *quoted with approval in U.S. Trust Co. v. New Jersey,* 431 U.S. at 19 n.23. And the Federal Constitution guards specifically against the "absurdity" of "transform[ing] private property into public property without compensation". As the United States Supreme Court held in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 164:

> *"a State, by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."* (Emphasis supplied.)

*See also Hughes v. Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all").

The nature of the interference with constitutionally protected property rights here is readily apparent by a comparison with the facts of other cases in which impermissible deprivations of property were found. For example, in the recent case of *U.S. Trust Co. v. New Jersey,* 431 U.S. 1 (1977), the Supreme Court struck down the retroactive repealing of a statutory covenant between New York and New Jersey that had limited the ability of the Port Authority to subsidize rail passenger transportation from revenues and reserves. Municipal bonds, for which those revenues and reserves were pledged as security, had been issued after the statutory covenant had been enacted, and the statutory covenant had become part of the contract rights of the bondholders. However, the covenant was only one of three security measures to limit the Port Authority's deficit, and it could only be described as "not

superfluous". *Id. at 19.* Nevertheless, even though "no one can be sure precisely how much financial loss the bondholders suffered" as a result of the statutory repeal, the Court held that the repeal unconstitutionally "impaired the obligation of the States' contract". *Id.* at 17-19.[2]

Moreover, unlike the situation here, where the bondholders' investment has been totally misappropriated without any justification, the impairment involved in that case was sought to be justified by the states' concern about their ability to finance mass transportation, energy conservation and environmental protection—which the Supreme Court found were "goals that are important and of legitimate public concern". *Id.* at 28. Nevertheless, the Supreme Court found the impairment of contractual expectations unconstitutional, because "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors". *Id.* at 29.

Similarly, in *W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56 (1935), the Supreme Court invalidated a statute that altered certain remedies for a mortgage that served as security for municipal bonds. The Court noted that "[n]ot even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected." *Id.* at 60. The Court concluded that "[w]ith studied indifference to the interests of the mortgagee or to his appropriate protection [the state legislators] have taken from the mortgage the quality of an acceptable investment for a rational investor". *Id.* The various changes in remedies, including timing and penalties, were "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security". *Id.* at 62.

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[2] The Court also noted that no compensation had been paid for the elimination of the security measure from the contract rights. 431 U.S. at 19 & n.16.

And again, in *Armstrong v. United States,* 364 U.S. 40 (1960), the Supreme Court found an unconstitutional taking when government action rendered state law liens unenforceable The liens became unenforceable due to sovereign immunity because the Federal Government had taken possession of the materials to which the liens attached. "The result of this was a destruction of all petitioners' property rights under their liens, although . . . the liens were valid and had compensable value." *Id.* at 46. Whether or not the Government had intended to extinguish the liens, it had to pay for the value of the liens pursuant to the Takings Clause. *Id.* at 48-49.

The "destruction of all . . . property rights" of the bondholders in the present case is easily measured and is immense. When the result in Idaho is coupled with the situation elsewhere, the bondholders have had taken away from them $2.25 billion plus interest. This is not a case in which a few provisions concerning the bonds have been changed, as was true in *U.S. Trust Co. v. New Jersey* and *W. B. Worthen Co. v. Kavanaugh.* Put simply, the bonds here have been rendered worthless. And the amount of the "total destruction . . . of all value", *Armstrong v. United States,* 364 U.S. at 48, has been staggering; $2.25 billion plus interest is plainly the "full and perfect equivalent for the property taken" from the bondholders. *Monongahela Navigation Co. v. United States,* 148 U.S. at 326. Thus the taking and impairment of contractual rights and expectations here substantially outweigh the takings and impairments found unconstitutional in case after case decided by the United States Supreme Court on this issue.

There is no claim here that the Idaho cities cannot pay back the bondholders; they simply do not want to do so. But the United States Supreme Court has held flatly that "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors". *U.S. Trust Co. v. New Jersey,* 431 U.S. at 29.

Chemical Bank does not assert that municipal bond contracts can never be altered in any way if, for example,

municipalities become insolvent. The bondholders do assume some risks, and the risk of insolvency, involving the bondholders' assessment of the municipalities' creditworthiness, is legitimately part of the bondholders' investment decision. But even in an insolvency, which is not this case, bondholders cannot simply be stripped of all of their property rights with not even an attempt at recompense, for that is a risk they do not assume and one the Constitution squarely protects against.

For example, in *Faitoute Iron & Steel Co. v. City of Asbury Park,* 316 U.S. 502 (1942), the United States Supreme Court found that the constitutional property rights of non-consenting bondholders were not violated when they were forced to participate in a workout plan for a bankrupt municipality in which new bonds with lower interest rates were exchanged for the old bonds. The Court stressed, however, that the plan had been approved by 85% of the creditors, and the new bonds had "substantial" value whereas the old bonds had "little value". *Id.* at 513. Noting that "a most depreciated claim of little value has, by the very scheme complained of, been saved and transmuted into substantial value", *id.* at 516, the Court found that no contractual right had been unconstitutionally impaired.

The present case is a far cry from the facts of *Faitoute.* Yet the United States Supreme Court has pointedly noted that *Faitoute* is "[t]he only time in this century that alteration of a municipal bond contract has been sustained by this Court". *U.S. Trust Co. v. New Jersey,* 431 U.S. at 27. *See also Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 103 S. Ct. 697, 705 n.14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets."), citing *U.S. Trust Co. v. New Jersey, W. B. Worthen Co. v. Kavanaugh* and *Murray v. Charleston.*

**C. The bondholders' constitutional rights can be protected even though the Idaho cities' agreements have been held to be void.**

We do not argue here that, as a matter of constitutional law, a state court cannot hold the actions or contracts of a municipality *ultra vires* and, therefore, unenforceable. Of course, such a result can occur. But that is the beginning, not the end, of the analysis, for to hold that there was no enforceable contract does not mean the bondholders cannot get their money back.

Put simply, there is no reason to attempt to sweep aside the bondholders' constitutional claim by extending the *ultra vires* doctrine to extinguish all the rights of the bondholders. If the *ultra vires* ruling can be viewed as legitimate state regulation to save citizens from the unauthorized acts of public officials, the contract can be disavowed and no further performance required under it, but the bondholders cannot be denied the right to have their money returned as "just compensation". The bondholders may not get the benefit of their bargain because of the *ultra vires* decision, but forced deprivation of *all* rights to their property takes governmental regulation too far. Put another way, this Court's decision exalts the rights of the Idaho cities and ratepayers, as the Court perceived them under Article 8, Section 3 of the Idaho Constitution, in complete derogation of the bondholders' rights under both the Federal and state constitutions. That conflict need not occur because this Court can give full force to the limitation on municipal indebtedness set forth in Article 8, Section 3 and still provide the bondholders with the remedy to which they are constitutionally entitled.

Moreover, if the Court gives exclusive attention to Article 8, Section 3, without giving concomitant consideration to the protections afforded by the Federal and state Takings, Contract and Due Process clauses, it will violate the fundamental precept of constitutional and statutory construction that provisions applying to the same subject must be considered *in pari materia. See Idaho Telephone Co. v. Baird,* 91 Idaho 425, 423 P.2d 337, 341 (1967).

Legitimate governmental regulation must coexist with freedom from governmental confiscation without compensation; otherwise, as the United States Supreme Court has held in an opinion written by Justice Holmes, "the contract and due process clauses are gone":

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. *But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.* One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922) (emphasis added).

Add further:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public conditions is not enough to warrant achieving the desire by

a shorter cut than the constitutional way of paying for the change." *Id.* at 415-16.

The *Ultra vires* doctrine may limit the bondholders' contract rights, but it cannot constitutionally devour all their stake as well.

The whole point in the Taking, Due Process and Contract Clauses is that individuals are to be protected from being forced by government action to bear a burden that should be borne by a larger community represented by government:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

*Armstrong v. United States,* 364 U.S. 40, 49 (1960), quoted with approval in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980). *See also Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).

That is the bedrock constitutional guarantee we ask this Court to enforce.

## II.

## THE STATE CONSTITUTIONAL RIGHTS OF THE BONDHOLDERS HAVE BEEN VIOLATED.

The Idaho Constitution has similar protections that forbid deprivation of the bondholders' property rights. Article 1 §13 provides that "[n]o person shall . . . be deprived of life, liberty or property without due process of law". Article 1, §14 provides that "[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor". And Article

1, §16 provides that "[n]o . . . law impairing the obligation of contracts shall ever be passed".[3]

The scope of these state constitutional guarantees is virtually identical to their Federal counterparts. *See, e.g., Roark v. City of Caldwell,* 87 Idaho 557, 394 P.2d 641 (1964); *Straus v. Ketchen,* 54 Idaho 56, 28 P2d 824 (1933); *Highway Dist. No. 1 v. Fremont County,* 32 Idaho 473, 185 P. 66 (1919).

Idaho's constitutional provisions, like their Federal counterparts, include contractual expectations within the realm of protected property rights. This Court has afforded such protection specifically in the context of municipal bonds:

> "The bondholders have a right to be paid their money when due and are protected from any change in the law which would defeat it." *Highway Dist. No. 1 v. Fremont County,* 32 Idaho 473, 185 P. 66, 67 (1919).

The Court has also recognized that complete defeasance of a property right, as has occurred here, violates the constitutional right to *some* remedy to protect that right:

> "While the remedy [for return of money] may be modified at the discretion of the legislative body, it cannot be taken away, for *the right to property necessarily implies a right to process of law to protect it." Fidelity State Bank v.*

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[3] The constitutions of the other states in which project participants are located—Washington, Oregon, Montana and Wyoming—have comparable provisions. *See* Washington Const. Art. I, § 3 (due process clause), § 23 (contract clause), § 16 (takings clause); Oregon Const. Art. I, § 10 (due process clause), § 18 (takings clause), § 21 (contracts clause); Montana Const. Art. II, § 17 (due process clause), § 29 (takings clause), § 31 (contract clause); Wyoming Const. Art. 1, § 6 (due process clause), § 33 (takings clause), § 35 (contract clause).

All of these constitutional provisions protect the bondholders. By discussing Idaho constitutional law in this memorandum, we do not suggest that Washington constitutional law does not also protect the holders of bonds issued through a Washington municipal entity; however, since the constitutions of all the states in which participants exist protect the bondholders, discussion of Idaho law is appropriate.

*North Fork Highway Dist.,* 35 Idaho 797, 209 P. 449 (1922).

Thus, the Idaho Constitution no more tolerates deprivation of property rights than does the Federal Constitution, and " 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief' ". *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 392 (1971), quoting *Bell v. Hood,* 327 U.S. 678, 684 (1946).

## III.

## REHEARING SHOULD BE GRANTED FOR CONSIDERATION OF THE LEGAL AND EQUITABLE ISSUES NOT ADDRESSED IN THE COURT'S DECISION.

This Court's September 26 decision addressed only the contention that the Idaho cities' Participants' Agreements were void under Article 8, Section 3 of the Idaho Constitution. The Court's holding was limited to that issue. The Court did not specifically decide the other legal, equitable and constitutional issues that were before it.

The writ of prohibition issued by the Court sweeps far more broadly than the *ultra vires* doctrine on its face allows. As the Court is aware, the language of the writ originated almost a year before the decision in this case, as part of the petitioners' original applications for relief.

Chemical urges the Court to address on rehearing the legal and equitable issues raised by the parties but not discussed in the September 26 decision.

Those issues are serious and they are not made irrelevant by the *ultra vires* decision. For example, the "estoppel" provision of Article 8 of the Uniform Commercial Code specifically applies here, as is made clear by the Comment to the Official Text of the Provision:

"A long and well established line of Federal cases recognizes the principle of estoppel in favor of bona fide

purchasers where municipalities issue bonds containing recitals of compliance with governing constitutional and statutory provisions, made by the municipal authorities entrusted with determining such compliance. . . . This section follows the case law trend . . . ." I.C. § 28-8-202 (1980), Comment 6.

Chemical also asserts that the issues of common law estoppel, waiver, ratification, laches, unjust enrichment and restitution preclude entry of the writ, as previously argued to this court.

The Court should fully consider those issues on rehearing. If the result is to permit an adequate remedy to the bondholders under traditional state law principles, the serious constitutional problems raised in the preceding sections of this memorandum may be avoided.

## CONCLUSION

For the reasons stated above, Chemical Bank's petition for rehearing should be granted.

Respectfully submitted this 31st day of October, 1983.

CLEMONS, COSHO & HUMPHREY, P.A.
By: /s/ HOWARD HUMPHREY
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# APPENDIX C

## APPENDIX C

## IDAHO SUPREME COURT/COURT OF APPEALS

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GARY ASSON, ET AL.,
*Petitioners,*

v.

CITY OF BURLEY, ET AL.,
*Respondents.*

ORDER

NO. 14719

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RICHARD H. BOHLE, ET AL.,
*Petitioners,*

v.

CITY OF RUPERT, ET AL.,
*Respondents.*

NO. 14809

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COUNSEL:

The Court has ORDERED that the PETITION FOR REHEARING BY INTERVENOR-RESPONDENT CHEMICAL BANK filed October 17, 1983 of the Court's Opinion issued September 26, 1983 be, and hereby is, DENIED.

DATED this 4th day of November, 1983.

By Order of the Supreme Court

/s/ FREDERICK C. LYON

cc: Counsel of Record

Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

# APPENDIX D

## APPENDIX D

## SUPREME COURT OF THE UNITED STATES

No. A-578

CHEMICAL BANK,

*Petitioner,*

*v.*

GARY ASSON, ET UX, ETC., ET AL.

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### ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 2, 1984.

/s/ WILLIAM H. REHNQUIST

Associate Justice of the Supreme Court of the United States

Dated this 23rd
day of January, 1984.

# APPENDIX E

## APPENDIX E

## SUPREME COURT OF THE UNITED STATES

No. A-585

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
*Petitioner,*

*v.*

GARY ASSON, ET AL.

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## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 2, 1984.

/s/ WILLIAM H. REHNQUIST

Associate Justice of the Supreme
Court of the United States

Dated this 24th
day of January, 1984.

# APPENDIX F

## APPENDIX F

### Affiliates and Subsidiaries (Except Wholly-owned Subsidiaries) of Chemical Bank

Chemical New York Corporation
Chemical Bank (Middle East) S.A.
Chemical Bank, A.G.
Chemical Commercio E Servicos, Ltd.
MCL and Co., Ltd.
Witan Enterprises, Inc.
Woodmere Enterprises, Inc.
Arrendadora Del Atlantico S.A.
Compania Arrendamento De Financiera, Arfin S.A.
Far East Chemco Leasing & Finance Corp.
P.T. Chemco Graha Sejahtera Leasing
Noroeste Chemical, S.A.
C.B. Insurance Services Ltd.
Chemical Asia, Ltd.
Chemical Bank Hong Kong Nominees, Ltd.
Apartmentos Boulvard, S.A.
Banco General De Negocias, S.A.
Banco Noroeste De Investimento
Banque Internationale Du Congo
Bank of New Providence Ltd.
Chemical Bank/Howard De Walden
Chemical Commercio E Servicos LTDA
Empresa Minera De Mantos Blancos, SA
Far East Bank and Trust Co.
Industrialization Fund of Finland, Ltd.
Inversiones Sudamericana, SA
Leyland Italia Finanziaria, SpA
Nalin Ind. Sendirian Berhad
Northwest Iron Co. Ltd., Delaware, U.S.A.
Private Export Funding Corp., U.S.A.
Private Investment Co. for Asia
Phoenix Travel (Strand) Limited

P.T. Multinational Finance Corp.
Saehan Merchant Banking Corp.
Sanluis Financial and Investment Co., Ltd.
Sifida
Sociedad Anonima Escuela Campo Alegre
Sociedad Financiera Exterior, CA
ChemCredit Sendirian Berhad
Florida National Banks of Florida, Inc.
Gulf Stream Aero Space
S.W.I.F.T.

# APPENDIX G

## APPENDIX G

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 10, clause 1, of Article I of the United States Constitution provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Article 8, Section 3 of the Idaho Constitution provides:

"Limitations on county and municipal indebtedness.—No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds (⅔) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for

that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district."